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HAROLD B. WILLEY, Clerk

In The
Supreme Court of the United States

October Term, 1955

No. 247

CHARLES EDWIN YORK,
Petitioner,

VERSUS

H. C. MCLEOD, Warden, Oklahoma State Penitentiary, McAlester, Oklahoma,
Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

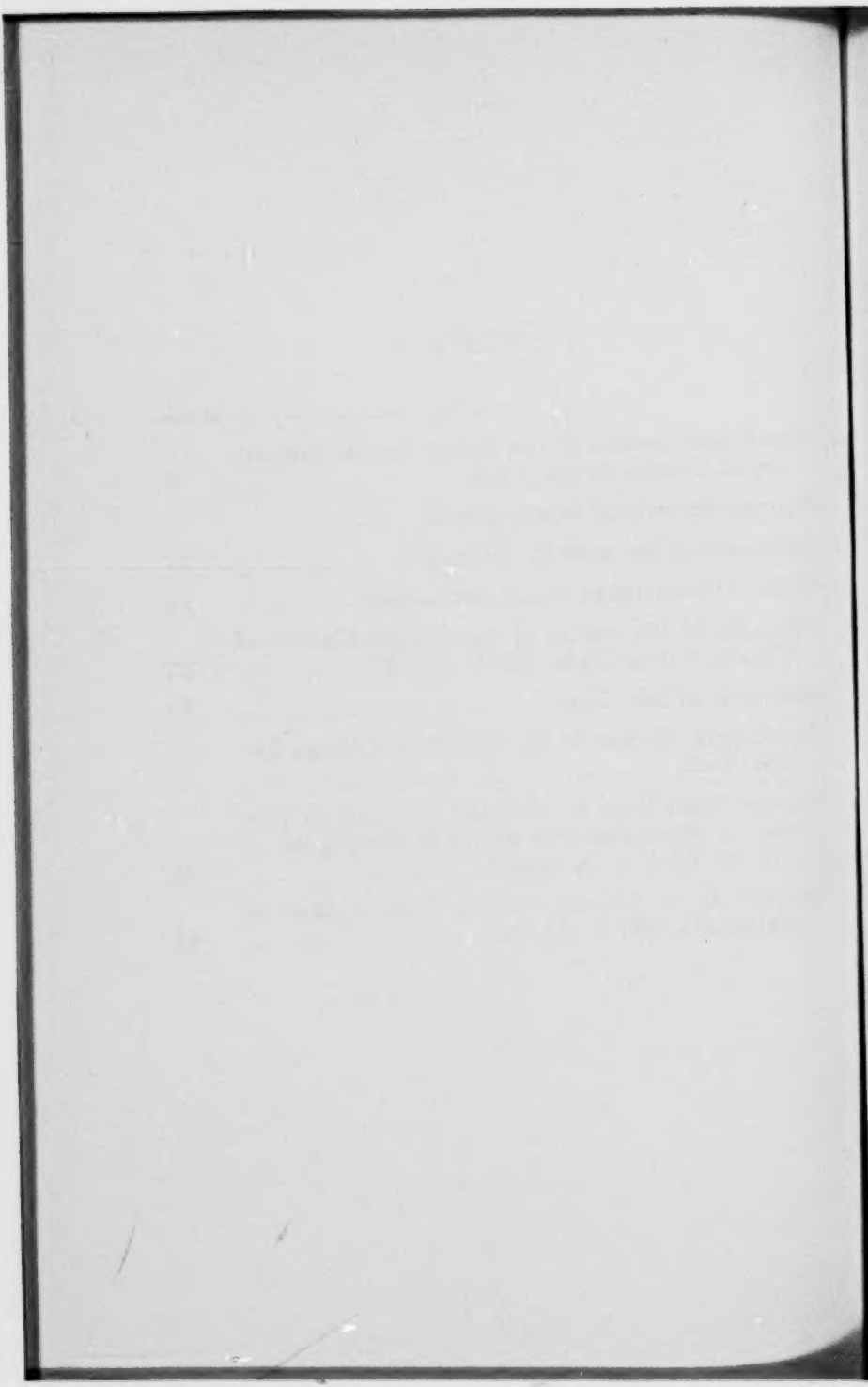
CHARLES EDWIN YORK, Petitioner.
By HERBERT K. HYDE,
% Roy St. Lewis,
National Press Building,
Washington, D. C.,

CARROLL SAMARA,
1015 Cravens Building,
Oklahoma City, Oklahoma.
Of Counsel,
JULY, 1955.

KING LAW BRIEF CO., 222 N.W. THIRD, OKLAHOMA CITY — PHONE FO 5-2969

INDEX

	PAGE
Appearance Docket in the habeas corpus proceeding of Charles Edwin York	1
Petition for writ of habeas corpus	3
Order setting the cause for hearing	11
Order: "Cause taken under advisement"	12
Opinion, In the matter of the Habeas Corpus of Charles Edwin York, 283 P. 2d 567	13
Statement of Mr. Tant	29
Appearance Docket in the appeal of Charles Edwin York	35
Excerpt from Brief of Plaintiff in Error in support of application for record at the expense of County filed in the appeal.	38
Opinion In re: Charles Edwin York v. State of Oklahoma, 281 P. 2d 769.	42



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HABEAS CORPUS

FEE BOOK COUNTY
Crime

Attorneys

No. CHARLES EDWIN YORK
Plaintiff in Error

Carroll Samara
Cravens Bldg., O. City

A-12181 vs.

State of Oklahoma
Defendant in Error

Date				Atty. General Debits	Miscellaneous	Credits
March	16	1955	To filing Pet for Writ of Habeas Corpus			State
March	30	1955	JE (Order, Jones P. J. "Set cause for oral April 6, 1955 (at 2:00 p. m.'			
March	30	1955	Notice to Attys.			
April	6	1955	JE Order, Jones P. J. "Cause taken under advisement". Notice to Attys.			
April	27	1955	Brief of Petitioner.			
April	27	1955	Supplemental Brief of Petitioner.			
April	27	1955	JE (OPINION — Writ Denied — Jones P. J.			
April	27	1955	(			
April	27	1955	(Copies to Carroll Samara, Atty. Gen., Co. Atty., Mandate & West.			

I, Andy Payne, Clerk of the Criminal Court of Appeals of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of page 321 of Fee Record Book Number 25 Criminal Court of Appeals of State of Oklahoma, the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this 30 day of June, 1955.

ANDY PAYNE, Clerk
By Ethel C. Hammett,
Deputy.

(SEAL)

FILED
in Criminal Court of Appeals
of Oklahoma
Mar 16 1955
ANDY PAYNE,
Clerk.

IN THE CRIMINAL COURT OF APPEALS,
STATE OF OKLAHOMA

No. A-12181

CHARLES EDWIN YORK,
Petitioner,

—vs—

H. C. McCloud, Acting Warden of the State Penitentiary,
McAlester, Oklahoma,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW Charles Edwin York, petitioner, and represents and shows to the Court as follows:

I.

Your petitioner is an inmate in the State Penitentiary at McAlester, Oklahoma, where he is presently serving a sentence of 45 years upon conviction in the District Court of Oklahoma County on the charge of Robbery with Firearms, said sentence having been pronounced by Honorable Albert C. Hunt, District Judge, on the 30th day of March, 1954. For this crime petitioner was jointly indicted with one Adrian Wayne Burns. Thereafter, severance having been granted, he was tried separately. Shortly after his conviction co-defend-

ant Burns made a full confession, admitting his own as well as your petitioner's participation in the offense charged and implicating one Robert O. (Bob) Hurt as being the man who conceived the idea of this robbery, laid out the details for its perpetration, and directed its actual commission. Robert Hurt was subsequently charged in Oklahoma County with Robbery with Firearms and has since been convicted thereof. At the trial of Hurt your petitioner gave testimony on behalf of the State of Oklahoma wherein he admitted his role in the offense and established Hurt's participation therein.

II.

Your petitioner is a resident of Tulare, California, a stranger to Oklahoma City, and, generally to this State. Upon his arrest and subsequent confinement in the County Jail of Oklahoma County he found himself in an utterly foreign community without friends and funds, being totally dependent for legal aid upon the accomplice Adrian Wayne Burns. The latter had local friends and relatives willing and able to assist him financially in securing counsel. Your petitioner was in a situation where he had to either accept the attorneys whose services were offered to him through Burns, or obtain legal guidance of the Public Defender. Considering the natural and instinctive mistrust with which prisoners generally regard public or court-appointed defenders, your petitioner had actually no other choice but

to accept the representation offered by his accomplice Burns. Exact circumstances under which counsel were engaged in the defense at trial level are not known to your petitioner but some of the revelations made during the trial of Robert O. (Bob) Hurt and the testimony adduced thereat provided an eloquent illustration of the machinations which took place behind the scenes anterior to the selection of the attorneys. It appears that at the very outset it was understood that Burns should accept the services of an Oklahoma City attorney, Frank Massad, who had the whole-hearted approval of Robert O. (Bob) Hurt. Mr. Massad, in his testimony given at the first trial of Mr. Hurt in November, 1954, which ended in a mistrial, and likewise in the course of the second trial of Mr. Hurt in February, 1955, conceded that in making his appointment as counsel for Burns, Hurt urged him (Massad) to bear in mind that it was very important to him that Massad "keep those boys from talking." It was further brought out by Mr. Massad, that the defense strategy followed at the York trial was, "we had to try York to save Burns."

Considerably after the original appointment of Mr. Massad, and upon approbation of Robert O. (Bob) Hurt, Mr. David Tant, an Oklahoma City attorney, was brought into the case by the family of Adrian Wayne Burns. Then, under somewhat obscure circumstances entirely unknown to your petitioner, Mr. Raymond

Plumlee, an attorney from Cordell, Oklahoma, was likewise engaged for Adrian Wayne Burns. All three of the hereinabove named attorneys, neither of whom was your petitioner's own selection, appeared for him at the trial of the cause. Mr. Tant himself conceded on the stand in his testimony during the first trial of Robert O. (Bob) Hurt that relations of attorney and client had existed between him and Robert O. (Bob) Hurt from the very inception of his engagement in the defense of Adrian Wayne Burns. This was an absolute and total surprise to your petitioner and Adrian Wayne Burns who had not been previously informed or advised that Mr. Tant was simultaneously representing Mr. Hurt, inasmuch as the latter was not even charged with any offense at the time of Mr. Tant's appointment. The third attorney involved, Mr. Plumlee, never attempted to conceal that his real client was Adrian Wayne Burns. He was Burns' home-town and family lawyer from Cordell.

Your petitioner would further show that he was lured into accepting the counsel who represented him at the trial level by repeated promises of making a common and joint defense with Adrian Wayne Burns and was lulled thereby to go to trial with the "aid" of attorneys who, entirely unknown to him, were representing three completely divergent, irreconcilable, and conflicting interests, they being interests of Robert O. (Bob)

Hurt, Adrian Wayne Burns, and his own. Charles Edwin York was entirely ignorant and unaware of the ties existing between Adrian Wayne Burns' attorneys and Robert O. (Bob) Hurt, and had no reason to believe that, instead of preparing a joint and common defense for your petitioner and Adrian Wayne Burns, the overall strategy of his lawyers was, using the words of Mr. Massad, "to try York to save Burns."

It is readily apparent that in such circumstances as hereinabove set out it was utterly impossible for the counsel to serve simultaneously all three masters, one of whom (Bob Hurt) was secretly and unknown to the others sharing the unswerving loyalty, fidelity, and devotion of the leading counsel, David Tant. The usefulness of legal representation had by your petitioner in his trial was thus reduced to a mere subterfuge, farce, sham and formality, his attorneys being unable to decide freely what was advantageous to him without weighing against it possible harm to their principal clients (Adrian Wayne Burns and Robert O. (Bob) Hurt). All three of the counsel, Messrs. Massad, Tant, and Plumlee, were greatly trammeled, impaired and hampered by the entirely irreconcilable interests of the several clients to the extent that your petitioner could not in the hands of these attorneys secure adequate protection of his just rights under the law. The situation was such that the counsel

were precluded from helpfully untying the Gordian Knot for fear of enmeshing in it the other accomplices.

Your petitioner respectfully submits that by reason of these conflicting interests and unquestionably divided loyalties of counsel he was unable to secure effective representation and assistance of competent, efficient and devoted counsel as guaranteed to him by the provisions of the State and Federal Constitutions; that he was totally ignorant and unaware of the other interests his counsel represented, and that by reason of such ignorance he did not and could not intelligently and understandingly waive his constitutional right to the guiding hand of a competent and loyal attorney.

III.

Your petitioner further shows and represents that he was repeatedly and unqualifiedly assured by Mr. David Tant that the latter would perfect petitioner's appeal to this Court, the last of which assurances having been uttered to him in open court during the November mistrial of Robert O. (Bob) Hurt where Mr. Tant, then acting as leading counsel for Hurt, asked him, in substance, the following question on cross-examination of your petitioner:

> "Is it not true that I am still your attorney and that I am now appealing your case to the Criminal Court of Appeals and am getting your Case-Made without any fee?"

To which your petitioner replied by saying:

"This is my understanding."

All these statements led the petitioner to believe that his case would be seasonably submitted to timely reach this Honorable Court. He was not cognizant until recently of the abandonment of his appeal by Mr. Tant due to the latter's failure to complete the record thereon. By the frustration of the relief sought from this Court your petitioner was greatly prejudiced in that he was deprived of his statutory right to obtain corrective process of an appellate tribunal.

Your petitioner further submits respectfully that due to the lack of the benefit of effective assistance by competent counsel in the proceedings at the trial level as well as throughout the attempted appeal he was denied due process of law and the right to a fair trial, both guaranteed by the State and Federal Constitutions.

WHEREFORE, your petitioner prays that a Writ of Habeas Corpus may be granted directed to said H. C. McCloud, Acting Warden of the State Penitentiary at McAlester, Oklahoma, commanding him to have the body of said Charles Edwin York before this Court at a time and place therein to be specified; that upon hearing hereof that petitioner be ordered transferred to the custody of the Sheriff of Oklahoma County, Oklahoma, and that this cause be remanded to the District Court of Oklahoma County, Oklahoma, for a new trial; and that

petitioner be ordered held in the County Jail at Oklahoma City, Oklahoma, awaiting said trial.

Respectfully submitted,

Charles Edwin York, Petitioner
By Carroll Samara /s/
Carroll Samara, His Attorney

STATE OF OKLAHOMA)
) SS
OKLAHOMA COUNTY)

CARROLL SAMARA, attorney for Charles Edwin York, the petitioner, being duly sworn says:

That the facts stated in the foregoing petition are true to the best of his knowledge and belief.

Carroll Samara /s/

Subscribed and sworn to before me this 15th day of March, 1955.

Shirley R. Sheppard /s/
(SEAL) Notary Public

My Commission Expires:
November 30, 1955.

FILED
in Criminal Court of Appeals
of Oklahoma
Mar 30 1955
ANDY PAYNE,
Clerk.

IN THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

No. A-12,181

In the Matter of the Habeas Corpus of CHARLES EDWIN YORK.

ORDER

It is ordered that the application to assume original jurisdiction in the above entitled and numbered cause be and the same is hereby set for hearing at 2:00 P.M. in the Criminal Court of Appeals courtroom on April 6, 1955.

Dick Jones /s/
Dick Jones, Presiding Judge

ATTEST:
Andy Payne /s/
Clerk

Page 321

HABEAS CORPUS

FEE BOOK COUNTY

Crime Attorneys

No. CHARLES EDWIN YORK

Plaintiff in Error

Carroll Samara
Cravens Bldg. O City
Atty. General

A-12,181 vs.

State of Oklahoma

Defendant in Error

Date		Debits	Miscellaneous	Credits
April 6 1955	JE Order, Jones P. J. "Cause taken under advisement". Notice to Attys.			

FILED
in Criminal Court of Appeals
of Oklahoma
Apr 27 1955
ANDY PAYNE,
Clerk.

IN THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

No. A-12,181

In the Matter of the Habeas Corpus of CHARLES EDWIN YORK.

SYLLABUS

1. Under Oklahoma Constitution (Article 2, Section 20) the right of one accused of crime to assistance of counsel means effective assistance by an attorney who gives the accused his complete loyalty and whose service is of such character as to preserve the essential integrity of the proceedings.

2. The right under Oklahoma Constitution of an accused to be represented by counsel is a personal right for the benefit of the accused which may be waived by him and where one attorney appears for two or more persons jointly charged with a crime and neither of the co-defendants object to the joint representation, such silence on their part amounts to a waiver of any right either might have to have the exclusive assistance of counsel.

3. Habeas corpus is available to one who has been convicted and sentenced without having effectively

waived his constitutional right to assistance of counsel and to whom expiration of time has rendered an appeal unavailable.

4. Criminal Court of Appeals will not issue writ of habeas corpus where accused has appealed his judgment of conviction, the judgment is affirmed, and question raised in habeas corpus was in existence and known to petitioner at time of appeal and was a matter which properly should have been presented by appeal.

Original action in habeas corpus by Charles Edwin York to secure release from the State Penitentiary. WRIT DENIED.

Carroll Samara, Oklahoma City,
Attorney for Petitioner

Mac Q. Williamson, Attorney General
Attorney for Respondent

JONES, Presiding Judge

This is an original action in habeas corpus brought by the petitioner, Charles Edwin York, to secure his release from confinement in the state penitentiary where he is serving a sentence of 45 years after conviction in the District Court of Oklahoma County on a charge of robbery with firearms. The appeal from such conviction has been affirmed by this court. *York* v. *State*, No. A-12,086, decided March 23, 1955.

Defendant's petition is based upon the proposition that at his trial he did not have the effective assistance

of counsel and did not waive his constitutional right to such assistance of counsel.

The facts are that on or about August 25, 1953, two men concealed themselves in the home of Mr. and Mrs. Gurley B. Lenn in Oklahoma City, while the Lenns were absent; and when they returned to their residence they were bound, abused and robbed of $5,000.00 in cash and approximately $2,800.00 in personal property. The robbers, evidently acting under the belief that a large amount of money was hidden about the premises, tortured Mr. Lenn with an electric curling iron in an effort to force him to disclose the whereabouts of the money. The robbers were armed with a pistol.

Subsequently one Adrian Wayne Burns was arrested and charged with such offense in a complaint filed before an examining magistrate. At that time Burns had pending against him a charge in Washita County of operating and conducting a gambling house and his attorneys on that charge were Raymond Plumlee of Cordell and Wendell Stockton of Oklahoma City. After his arrest on the robbery charge those two attorneys were contacted by Mr. Burns and Attorney Stockton suggested that David Tant, an attorney of Oklahoma City, be employed to assist them in the defense of the case. Mr. Tant and Frank Massad, another attorney of Oklahoma City, were contacted and Burns and members of his family employed Plumlee, Tant and Massad to

represent Burns on the robbery charge and agreed to pay them $7,500.00 as their fee for such representation. A substantial part of the fee was paid immediately.

About three or four weeks later Charles Edwin York, the petitioner herein, was arrested in Tulare, California, and jointly charged with Burns in the robbery of the Lenns. Upon the return of York to Oklahoma City to answer the charge filed against him, he and his mother consulted Mr. Tant concerning his representation of York and informed Tant that they were without funds with which to pay him, but that if he would agree to represent York they would try to obtain some funds and pay him something for his work. A joint conference was then held, with York, Burns and the three attorneys for Burns attending, and it was there agreed that since there was nothing hostile and conflicting in the interests of Burns and York that the attorneys already employed by Burns would assume the obligation of also defending York. This arrangement was entirely satisfactory to all parties concerned and thereafter the three attorneys appeared as counsel for both Burns and York. Thereafter on Dec. 7, 1953, York and Burns were jointly charged by an indictment filed by a grand jury of Oklahoma County with the crime of robbery with firearms as aforesaid. Upon the arraignment of the two accused men in the District Court of Oklahoma County, a joint motion to quash the indictment was filed by their attorneys.

Five witnesses were sworn, evidence was introduced and the motion to quash was overruled. Each accused then entered his plea of not guilty. The cause was assigned for trial, counsel for the defendants asked for a severance and the county attorney elected to first try York. The trial of York commenced on March 15, 1954, and lasted six days. He was ably represented throughout the trial by the three attorneys above mentioned who introduced evidence from many witnesses tending to establish an alibi for York. The jury after considering the case for several hours returned a verdict of guilty and pursuant to their verdict York was sentenced to serve 45 years in the penitentiary.

Thereafter counsel for York filed an application in the District Court of Oklahoma County for a Case-Made at the expense of Oklahoma County. Upon the denial of such motion, counsel for the accused filed a motion in the Criminal Court of Appeals seeking an order from this court directing that a Case-Made be prepared at the expense of Oklahoma County. Upon a showing being made that counsel had been paid several thousand dollars to represent the accused and his co-defendant, Burns, the motion was denied. Thereafter Attorney Tant had the court reporter prepare at Tant's expense a transcript of the record to which was attached a Petition in Error which was then docketed in this court as case No. A-12,-086 as an appeal from the conviction sustained by York.

Allegedly being unable to secure funds to pay for a Case-Made, Attorney Tant at the suggestion of this court prepared a statement of the evidence in narrative form. The county attorney refused to agree to the accuracy of said statement so prepared but did agree to all of it except the statement with reference to the cross-examination of York. Thereupon Attorney Tant ordered the district court reporter to prepare a transcript of York's testimony for which Tant agreed to pay from his own funds.

In the meantime shortly after York had been convicted, his co-defendant Burns decided to make a full disclosure of the facts surrounding the alleged robbery of the Lenns. He accordingly discharged his attorneys and entered into some sort of an agreement with the county attorney concerning his case, the exact nature of which has not been disclosed to this court, wherein Burns agreed to make a full disclosure of the details of the alleged crime and to testify concerning the part played by a third alleged conspirator, to-wit, one Robert O. Hurt. Thereafter the said Hurt was charged with the robbery of the Lenns and he employed Attorneys David Tant and William O. Mounger to represent him. His case was set for trial in November, 1954.

York had been transported to the State penitentiary to commence the serving of his sentence. During his incarceration at the prison representatives of the county at-

torney's office contacted him on different occasions and York finally agreed to testify as a witness against Hurt and he did appear and testify as a witness against Hurt at Hurt's trial in November, 1954, at which a mistrial was had because of a hung jury. In his testimony in that trial, York confessed his complicity in the robbery of the Gurley B. Lenns and testified that the plan to rob them was made by Hurt. After this testimony by York, Attorney Tant appeared before this court and informed the court that he had made arrangements for preparation of the record to complete the appeal of Yok but that in view of York's testimony that he was guilty of the crime, he felt that it would be a useless expense and gesture to attempt to convince the Criminal Court of Appeals that York was innocent. He did ask for and was granted additional time to inform York as to his opinion concerning the appeal so that if York desired anything further done, he would have an opportunity to do it. Thereafter Attorney Tant informed this court that petitioner York was evidently relying upon the office of the county attorney of Oklahoma County to assist him in avoiding the payment of the full penalty imposed upon him in the judgment and sentence pronounced after his conviction in the District Court of Oklahoma County and that he, Attorney Tant, did not desire to brief the case in the absence of a request from York that he do so, and the appeal so far as he was concerned could be sub-

mitted for determination on the record which Tant had filed. In the interim present counsel for York filed the petition in habeas corpus and made no effort to present the question here involved in the appealed case although the appeal was still pending at that time. A week after the habeas corpus action was instituted the opinion of this court was filed affirming the judgment and sentence of the District Court of Oklahoma County.

It is the contention of the petitioner that he was merely a pawn in the conspiracy to rob. That the master conspirator was Hurt. That unknown to him Hurt had contacted Massad and Tant to represent him at the time they were purportedly representing the petitioner York. That their interests were hostile and conflicting and that because of such York was denied the effective assistance of counsel during the trial.

Petitioner relies principally upon the case of *Glasser* v. *U. S.*, 315 U. S. 60, 86 L. Ed. 680, annotated in 148 A. L. R. 183. That case involved a prosecution in the federal court for conspiracy to defraud the United States. The conviction as to Glasser was reversed but affirmed as to the other conspirators, the Supreme Court holding that the trial court erred in appointing Glasser's attorney to represent a co-defendant whose interests were hostile to that of Glasser. In the headnotes to the case the law is set forth as follows:

> "Error on the part of the court in designating counsel for a defendant in a criminal case to represent a co-defendant also, after defendant had expressed an objection to the proposed designation, will be deemed prejudicial where the case against such defendant is not a strong one, and the failure of his counsel to undertake the cross-examination of one of the witnesses for the prosecution and to object to certain testimony as being inadmissible against him was influenced by a desire to protect his other client."

That case and the other cases cited involved similar questions presented on appeal from convictions, it being held that under the Sixth Amendment to the federal constitution, which is comparable to Article 2, Section 20, of the Oklahoma Constitution, the right to assistance by counsel means effective assistance by an attorney who gives the accused his complete loyalty and whose service is of such character as to preserve the essential integrity of the proceedings. *Craig* v. *U. S.*, 205 F. 2d 343; *District of Columbia* v. *Scott*, 214 F. 2d 860.

It should be borne in mind that this is a habeas corpus action and it is well settled that in a collateral attack upon a judgment of conviction, regular on its face, by habeas corpus, the judgment will not be vacated unless it is void as having been rendered without jurisdiction. *Ex Parte Brown*, 90 Okl. Cr. 129, 211 P. 2d 293; *Ex Parte Potts*, 89 Okl. Cr. 89, 205 P. 2d 522; *Ex Parte Lewis*, 85 Okl. Cr. 322, 188 P. 2d 367; *Ex Parte Wallace*, 81 Okl. Cr. 176, 162 P. 2d 205.

It has also been held:

> "The court will not issue writ of habeas corpus where accused has appealed his judgment of conviction, the judgment is affirmed and questions raised in habeas corpus proceedings were in existence and known to petitioner at time of appeal and were matters which properly should have been presented by appeal." *Ex Parte Herren*, 74 Okl. Cr. 154, 124 P. 2d 276.

However, it is established law in Oklahoma that habeas corpus is available to one who has been convicted and sentenced without having effectively waived his constitutional right to assistance of counsel, and to whom expiration of time has rendered an appeal unavailable. *In Re: Stevens*, 81 Okl. Cr. 65, 160 P. 2d 415; *Ex Parte Cornell*, 87 Okl. Cr. 2, 193 P. 2d 904, and cases therein cited.

However, the guarantee under the Oklahoma Constitution of the right of an accused to be represented by counsel is a personal right for the benefit of the accused which may be waived by him, and even should we concur in the rules of law set forth in the appealed cases cited on behalf of petitioner, we would also be forced to conclude that if the accused in a criminal case may waive the right to have any counsel at all appear for him, he surely could waive any right he might have to have the exclusive assistance of counsel.

The record discloses that after the arrest of York that York, the co-defendant Burns and the three attorneys for Burns all met and discussed the case. It was

agreed that the attorneys for Burns would represent York and York acquiesced with full knowledge that the fee for their services was paid by Burns. At no time during the trial or on the appeal was the issue now raised presented for determination. Furthermore, we are firmly convinced that the attorneys who appeared for York at his trial did all that was humanly possible to secure his acquittal. That they were unable to do so was not because of lack of representation, but because of the strength of the State's case. Counsel has wholly failed to show where the interests of Burns and York were hostile or show where counsel omitted anything in York's defense because of their representation of Burns. On the contrary the evidence at this hearing shows diligent and faithful representation of York.

Present counsel insists that York was sacrificed to save Burns and Hurt. The testimony of Attorney Tant in this connection absolutely refutes this contention. He testified that at the time he was employed by Burns and later by York that neither of them made any mention that Hurt was connected with the alleged crime and that his later employment to represent Hurt was made with the knowledge of both Burns and York and no mention was ever made by any of them that their interests might conflict so that the representation of them by the same attorneys would be improper.

Present counsel for petitioner contends that his attorneys decided to throw him to the wolves to save Burns and Hurt. We feel this contention is absurd in the face of the record. At the time counsel for York and Burns asked for severance they had no way of knowing whether York or Burns would be first tried. That was a matter solely for the State to determine. The State under the law had the option to elect which of the defendants they would first try and they chose York. Until York was convicted and sentenced to serve 45 years in the penitentiary, his accomplice, Burns, had steadfastly maintained his innocence. The stiff sentence received by York upset Burns to the extent, as shown by the evidence before us, that Burns contacted the county attorney and sought to make an agreement with him whereby he would divulge fully the facts of the purported robbery and testify for the State.

We can foresee that if we should vacate the judgment and sentence pronounced against petitioner York on the flimsy argument here presented, that no end of difficulty would be presented in the future in cases involving two or more individuals accused of crimes. In any of them if the various defendants were represented by the same counsel and were separately tried and convicted there would be just as much to support a reversal of the conviction of any of them as in the instant case.

Nothing herein should be construed as reflecting upon the conduct of the county attorney or his assistants. It is his duty to ferret out and prosecute those who violate the laws of the State. Where two or more are involved, because of inability to secure evidence it often becomes necessary to make agreements with one of the accused to testify in order to secure convictions. This practice is not frowned upon but is generally upheld by the courts. In this case if the county attorney feels that York has been of material assistance to him and he wishes to help him, the only recourse left is for an application to the Governor through the Pardon and Parole Board for a commutation of sentence. Even on appeal this court is not authorized to commute sentences as an act of grace. It is true that we may modify the sentence imposed upon one convicted of crime when the record before us shows that justice requires it. Because of the horrible and brutal nature of the crime which was admittedly committed by York, this court on appeal did not believe that the ends of justice required a modification of the sentence. The matter of grace in the form of a commutation of sentence is an entirely different matter to be directed to the Pardon and Parole Board of this state.

The writ of habeas corpus is denied.

BRETT and POWELL, JJ., concur.

POWELL, J., concurring:

I agree that the writ of habeas corpus applied for should not issue.

I can appreciate the position in which original counsel, Tant, was placed when, while he was in process of perfecting his client's appeal, petitioner York decided to confess his guilt to the charge for which he had been convicted and implicate one Robert O. Hurt, who was also being represented by petitioner's counsel, though the last representation, from the record before us, was undertaken subsequent to the representation of York.

It is suggested that under the circumstances the appeal in case No. A-12,086, *York* v. *State*, ... P. 2d ...., by Case-Made would have been futile. Perhaps so, from facts now before us, but this might not always be the case. We note from the body of the opinion in the above case it is said: "An examination of the petition in error discloses that the questions assigned as error can only be determined by the examination of a Case-Made containing a certified record of the evidence introduced at the trial. Since the record of the evidence introduced at the trial is not before us, we cannot determine any of the assignments of error. There is nothing in the transcript of the record to show that the judgment and sentence should not have been rendered."

The defendant York made a showing in this court that he was a pauper, and ordinarily we would have

ordered a Case-Made at the expense of Oklahoma County, where he had been tried, but the evidence showed that co-defendant Burns and his family had paid Mr. Tant and associates several thousand dollars to defend not only Burns, but York. Under such circumstances we did not feel like requiring the tax-payers to pay for the record.

It turned out that Burns and York testified at the trial of Hurt, and for the State, implicating Robert O. Hurt. A sharp conflict in interest between York and Burns on one side, and Hurt on the other, developed. And while under the circumstances then appearing counsel may have been convinced that all further efforts in behalf of York would prove futile, still it occurs to me that it was his duty, in addition to the petition in error and transcript already filed, to have narrated such of the evidence heard by the court that he felt supported his claim of error, and presented the same in proper time to the trial court for settlement, the same as if the court reporter had typed out such testimony. The county attorney would then have been forced to submit his version and the trial court would have been compelled to have determined the facts. Such narration filed would have preserved the record, and counsel could never have been accused of neglecting his client, as is vigorously charged in petition and brief now before the court. See, for procedure, *Ridenour* v. *State*, 94 Okl. Cr. 92, 231 P. 2d 395, 401, 402.

Having made possible an appeal by Case-Made, counsel could then have made application to this Court to withdraw from the case.

While from the matters set out in the opinion herein, I must agree that in this particular case the appeal even by Case-Made would have been futile, still I feel that as a matter of principle defendant should have been enabled to have had this court so determine, rather than in effect having such determination made by counsel at a time he was in a position by force of events, even though he could not control such events, of representing clients with conflicting interests.

No. A-12,181

Charles Edwin York,

Petitioner,

vs.

H. C. McCloud, Acting Warden of The State Penitentiary, McAlester, Oklahoma,

Respondent.

CERTIFICATE

I, Andy Payne, Clerk of Criminal Court of Appeals of the State of Oklahoma, do hereby certify that the foregoing is a complete and correct copy of the Petition for Writ of Habeas Corpus, orders of Criminal Court of Appeals of March 30th and April 6th, 1955, and Opinion of Criminal Court of Appeals as the same remains on file in this office.

In Testimony Whereof, I have hereunto set my hand and Seal of this Office this the 30th day of June, 1955.

Andy Payne,
Clerk of Criminal Court of Appeals.

(SEAL)

STATEMENT

BY JONES, P.J.: This is a habeas corpus action presented by Charles Edwin York in which he seeks to secure his release from confinement in the penitentiary after a conviction in the District Court of Oklahoma County for the crime of robbery with firearms. Pursuant to a telephone conversation with the Presiding Judge, Mr. David Tant, who appeared for the petitioner York in the trial of the case, is now before the court and will make a statement concerning his employment and representation of the petitioner in the trial. All right, go ahead.

MR. TANT: When Mr. Burns was arrested charged with this offense he was brought to Oklahoma City. It was my understanding from both Mr. Burns and Wendell Stockton that he called Mr. Stockton, an attorney in Oklahoma City who had been representing Mr. Burns in Cordell, Oklahoma, on a charge of operating and conducting a gambling house. That at that time Mr. Burns told Mr. Stockton that he felt that Mr. Stockton had not had sufficient experience to represent him in the trial of the case alone. Mr. Stockton told him that he would secure me, Dave Tant, to assist him in the trial of the case. Mr. Raymond Plumlee, who is now deceased, an attorney in Cordell, was also assisting Mr. Stockton in the trial of the case in Cordell and also came to Oklahoma City at the time that Mr. Burns was arrested on this charge. At the time of Mr. Burns' arraignment in the justice court, for some reason personally

unknown to me, Mr. Stockton did not appear and so far as Burns and Stockton were concerned, the relationship of attorney and client ceased. Mr. Burns' mother, his brother, brother-in-law and sisters later consulted Mr. Gomer Smith, Jr., and had practically agreed upon some kind of representation. In the meantime Mr. Frank Massad had entered the case and it later appeared to Mr. Smith that there might be a conflict of interests between Burns and Mr. and Mrs. Gurley B. Lenn on account of a former consultation with the Lenns by some member of Mr. Smith's firm. As well as I remember, Mr. Smith called me from his office at the time the Burns were there and asked me if I would be interested in going into the case. I told him I would, and some week or more later I received a telephone call from Mr. Massad's office and immediately went to his office where I met for the first time Mr. Burns' brother, his mother and his brother-in-law and I believe, two sisters. We agreed at that time upon an attorney fee of $7,500.00 for the representation of Mr. Burns. This fee was to be cut three ways, one-third to me, one-third to Frank Massad and one-third to Mr. Raymond Plumlee of Cordell, Oklahoma. Of that fee I have received $1,600.00. I do not know what the other attorneys received. At that time the name of York had never been mentioned so far as I was concerned personally. I knew nothing about him. Later, however, probably three or four weeks or a month, a man by the name of York was arrested in Tulare, California, charged with being with Mr. Burns at the time the robbery was committed. I took it upon myself to call an attorney at Tulare, California, and asked him to interview Mr. York. He did so and upon this attorney's advice and my advice Mr. York waived extradition and came voluntarily back to Oklahoma. When he arrived here, he had no money whatsoever, not even cigarette money, and stated that he had no way of raising any

money whatsoever to defend his case. I discussed the matter with my co-counsel and we agreed among ourselves and with Mr. Burns and with Mr. York that in so far as we had a common battle we would all join hands and defend Mr. York in the case without any additional attorney fees. Along about this time a grand jury was called, consequently we never had a preliminary trial. The matter drug along for some weeks before an indictment was returned by the grand jury. Sooner or later the case of York and Burns was set for trial. The defendants asked for a severance and the State elected to try Mr. York first. There was some discussion at that time between York and his mother as to why York was being tried first. I tried to explain to them that inasmuch as we had asked for a severence, the State had a right to elect which defendant they would try first. I don't know whether they ever thoroughly understood why York was tried first but at any rate I did my dead level best to explain to them that that was a right the law gave the State and they could elect as to which defendant they would first try. Somewhere during the discussions or during the newspaper reports of the case it was indicated that a city constable might be involved. No name was given, however, it was more or less common knowledge on the street that one Robert O. Hurt was the constable involved. I had known Bob Hurt since he was a barefooted boy in Tillman County and had also known his brother and was fairly well acquainted with his father. Mr. Hurt had been talking to Mr. Massad, another attorney in the case, from time to time, and Burns, Mr. Hurt and Mr. Massad prior to the Eddie York trial stated that in all probability Mr. Hurt would be charged later as a principal in the case and it was agreed among us that Mr. Massad and I would represent Mr. Hurt in the event he was charged. So far as I am personally concerned, I don't remember whether I ever discussed

at length with Eddie York the question of my representation or possible representation of Mr. Hurt. However, a few days before the York trial an article appeared in the newspapers stating that the name of a city constable would be mentioned in the York trial and in all probability the constable would be charged. I discussed that article with Mr. York. He told me at that time that he did not know Robert O. Hurt; that he had never seen him. I can't say for sure whether I told him that I would represent Mr. Hurt if he was charged, but I am sure that he understood from all the conversations that in the event Mr. Hurt was charged that I would in all probability be retained as one of his counsel. The York case came on for trial and lasted the better part of a week and I know that I did my very best in the defense of his case. There was a question of his wearing some boots in the case. He stated that he did not have the boots on, that the boots had been in Tulare, California, with a friend of his there some time prior to the alleged robbery. I spent some $30.00 or $40.00 on telephone calls in connection with the young man who was supposed to have had the boots, and he corroborated Mr. York's story as to the boots, and I wired this young man, I don't remember his name, money to buy an airplane ticket to come to the trial. He did come and testified. We paid his expenses while he was here and I think Mr. Plumlee bought his airplane ticket home. In this connection I might state on behalf of Mr. York that the State now admits that Mr. York was not wearing the boots in question at the time of the robbery. The jury was out a long time before deciding on a verdict. They went out in the afternoon, were out all night and about noon the next day brought in their verdict. I filed a motion for a new trial, gave notice of appeal and asked for a record at the expense of the county. Judge Hunt denied this application for a record. I then ordered a transcript includ-

ing all the evidence taken at the time of the hearing on the application for the record and motion for new trial. I paid for this out of my own pocket, some $165.00 or $170.00, then made an application before this court for a record at the expense of the county thinking that I had introduced sufficient testimony to show that the defendant York was a pauper, and I will say that I do believe now that there were substantial errors in the record. However, this court denied the record at the expense of the county and the matter lay here for some time and prior to the confession of York, I asked the court to allow me to bring up part of the record and an agreed statement of facts on the balance. I put in a great deal of time dictating what I thought were the material parts of the record. I ordered Mr. York's testimony transcribed by the court reporter, Mr. ....., Judge Hunt's court reporter, and he went to work on York's part of the testimony. It is my recollection that the cost of York's testimony alone came to about $125.00. Along about this time Mr. York made his confession and up to date I have not received, that is, I have not gone to the court reporter for the record and have not paid him for it. However, as I am obligated to him, I will pay for it.

BY JONES, P.J.: Mr. Tant, did you fail to do anything within your knowledge to defend this man?

MR. TANT: I did everything that was within my power. I have spent at least $400.00 on this boy's lawsuit out of the $1,600.00 I received from the Burns.

BY JONES, P. J.: Was there ever anything or any idea in your mind to try to sacrifice York to save Hurt?

MR. TANT: Certainly not.

CERTIFICATE

The above and foregoing is a true and correct copy of the statement of Mr. Tant before the Criminal Court

of Appeals on April 11, 1955, to the point indicated on the transcript. Thereafter, Mr. Tant had a further conversation with the judges which was not taken by me and of which I have no record.

Dated this 10th day of May, 1955.

Billie Jean Cape
Reporter

Page 226 FEE BOOK OKLAHOMA COUNTY

CRIME—Robbery with firearms.
45 yrs. in Pen. Dist. Ct. No. 22283

Attorneys

No. Charles Edwin York
Plaintiff in Error

A-12,086 vs.

State of Oklahoma
Defendant in Error

David Tant & Frank Massad,
Leonhardt Bldg.
Raymond T. Plumley, Cordell
(Deceased)

Atty. Gen.
Co. Atty.

Date				Debits	Miscellaneous	Credits
May	10	1954	To filing petition in error and case made.			State
May	10	1954	Leave to file without cost. Brett. J.			
May	10	1954	Issue Certificate of appeal.			
May	11	1954	Application for record & case made at the expense of Okla. County.			
May	12	1954	J. E. Order, Powell, P. J. "Hearing on Application of Plaintiff for record and case made at expense of Okla. Co. Hearing & Matter taken under advisement until May 19, 1954, "Notice.			
May	19	1954	J. E. Order, Jones, J. "Application of plaintiff requiring Okla. County furnish case made continued at request of plaintiff until May 26, 1954, at 10 o'clock," Notice.			

May 24 1954 (Brief of pltiff in error in support of
May 24 1954 (application for record at exp of County & ack of service.
May 26 1954 JE (Order, Jones, J., "Application for
May 26 1954 (casemade at expense of Okla. Coun-
May 26 1954 (ty is denied." Notice to Attys.
May 28 1954 Notice to appli for order to extend case made.
May 28 1954 Application for order to make & serv c made.
May 28 1954 JE: Powell, Judge, order ext time to make & serv cm.
Sept 30 1954 JE Order, Powell, P.J. "Setting cause for Oral Oct. 20, 1954." Notice.
Oct 20 1954 JE Order, Powell, P.J. "Stricken from assignment & reset for 10-26-54 at 10:00." Notice.
Oct 26 1954 JE (Order, Powell, P.J. "Plaintiff given 20 days to complete the record. State,
Oct 26 1954 (given 30 days thereafter to file brief." Notice to Attys.
March 23 1955 JE (Opinion — Affirmed — Jones P.J.
March 23 1955 (
March 23 1955 (Copies to David Tant & Frank Massad, Co. Atty. Atty. Gen.
(Mandate & West.
April 8 1955 Mandate issued.
April 8 1955 Receipt for mandate.
April 8 1955 Court Clerks Return.

CERTIFICATE

I, Andy Payne, Clerk of the Criminal Court of Appeals of the State of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the filings in Fee Book No. 25 Page 226 of this Court in the above matter, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this 17th day of June, 1955.

ANDY PAYNE, Clerk
By Andy Payne
Deputy

(SEAL)

EXCERPT FROM BRIEF OF PLAINTIFF IN ERROR IN SUPPORT OF APPLICATION FOR RECORD AT THE EXPENSE OF COUNTY

2.

and that neither he nor his counsel can agree with the County Attorney of Oklahoma County as to the various facts testified to in said cause; that he is wholly without money and that he has no property; that he had no money at the time of his arrest and has no money at this time nor means of raising money to assist him in the appeal of this cause and that unless an order be made requiring the record to be furnished him at the expense of Oklahoma County he will, because of his poverty be deprived of his right of appeal; defendant further stated that he had no money at the time of his arrest and that he had no money with which to pay attorneys to represent him and that he had not paid the attorneys who represented him at the trial of his said cause any fee whatsoever. Attached to this application for record was the affidavit of the defendant and the affidavit of Mr. David Tant, one of the attorneys who represented the defendant at the trial of said cause (Tr. 58 to 64).

The hearing on defendant's application for record came on for hearing on the 31st day of March, 1954, at that time the defendant took the stand and testified as a witness in support of his application. He stated:

"That he had no money at this time; that he had no property; that he had no way or means of rais-

ing any money with which to perfect an appeal in this case; that his people had no money; that his father worked for wages on a farm and could not help him; that he had paid his attorney who represented him on the trial of his case no fee whatsoever; that he had no was of raising money with which to pay the reporter for a record and case-made (Tr. 66-67)."

Mr. David Tant, one of the attorneys for the defendant testified in support of the defendant's motion, stating:

That at the time Wayne Adrian Burns was arrested he together with Mr. Frank Massad and Raymond T. Plumley, were employed to represent Mr. Burns. At that time Mr. York had not been arrested and the attorneys knew nothing of any connection he might have with the case of

CERTIFICATE

I, Andy Payne, Clerk of the Criminal Court of Appeals of State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of Page Two of the Brief of Plaintiff in Support of Application for record at the expense of County as same remains on file in my office, in Cause Number A-12086, Charles Edwin York versus State of Okla.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this 30 day of June, 1955.

ANDY PAYNE, Clerk
By Ethel C. Hammett
Deputy

(SEAL)

3.

Mr. Burns. York was arrested later in California and brought to Oklahoma City. When the attorneys talked to him relative to his case he had no money and no way of getting money. His mother came to Oklahoma City later she had no money and no way of raising money; she had no property of any kind or character whatsoever. In as much as the attorneys had been retained to represent Burns and thinking it necessary to represent York in order to protect the interest of Burns and as it was a common fight he with the other attorneys had represented York without any fee; that Neither York or his people had any way of raising money with which to pay for a record in this case (Tr. 75).

After some argument regarding the application for record the same was by the court denied, to which the defendant excepted (Tr. 80). The defendant was at the same time given permission to file an amended motion for record at the expense of Oklahoma County, which amended application was on the 3rd day of April, 1954, filed with the clerk of the District Court of Oklahoma County. The matter came on for hearing the same day, said amended application containing all the allegations contained in the first or original application. The amended application was sworn by the defendant, David Tant and Raymond T. Plumley, attorneys for the defendant (Tr. 84 to 91). By stipulation it was agreed that all the evidence introduced in support of the original application should be considered in support of the amended application. The affidavit of Ramon T. Plumley, one of

the attorneys of the defendant stated that he had read said application and same was true; that he had received no fee from defendant but with the other attorneys in the case had agreed to represent York without fee in as much as said attorneys had been retained to represent Burns. To the same effect was the affidavit of David Tant attached to said amended application (Tr. 87, 88, 90).

There was also attached to said amended application the affidavit of Mrs. Viola York, mother of the defendant, to the effect that she had read said amended application for record at the cost of Oklahoma

CERTIFICATE

I, Andy Payne, Clerk of the Criminal Court of Appeals of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of Page Three of the Brief of Plaintiff In Support of Application for record at the expense of County, as the same remains on file in my office, in Cause Number A-12086, Charles Edwin York versus State of Oklahoma.

In Witness Whereof I hereunto set my hand and affix the Seal of said Court, at Oklahoma City, this ___ day of ___, 19_____.

ANDY PAYNE, Clerk
By_____
Deputy

NO. A-12086

CHARLES EDWIN YORK,

Plaintiff in Error,

vs.

STATE OF OKLAHOMA,

Defendant in Error.

CRIMINAL COURT OF APPEALS OF OKLAHOMA, March 23, 1955.

Syllabus by the Court.

Where an appeal is by transcript with petition in error attached, the Criminal Court of Appeals cannot consider assignments of error which can only be determined by an examination of a case-made incorporating the evidence taken at the trial of the accused.

Appeal from the District Court of Oklahoma County; Albert C. Hunt, Trial Judge.

Charles Edwin York was convicted in the District Court of Oklahoma County for the crime of robbery with firearms, and was sentenced to serve a term of 45 years in the penitentiary. Affirmed.

David Tant, Oklahoma City, for plaintiff in error.

Mac Q. Williamson, Atty. Gen., for defendant in error.

JONES, Presiding Judge.

Charles Edwin York was charged by an information filed in the District Court of Oklahoma County with

the crime of robbery with firearms, was tried, convicted and sentenced to serve 45 years in the penitentiary.

A petition in error with a transcript of the record attached has been filed in this court. However, no brief has been filed in behalf of the accused and no appearance was made in his behalf at the time the case was assigned for oral argument.

An examination of the petition in error discloses that the questions assigned as error can only be determined by the examination of a casemade concerning a certified record of the evidence introduced at the trial. Since the record of the evidence introduced at the trial is not before us, we cannot determine any of the assignments of error. There is nothing in the transcript of the record to show that the judgment and sentence should not have been rendered.

The judgment and sentence of the District Court of Oklahoma County is affirmed.

BRETT and POWELL, J.J., concur.